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# In The
# SUPREME COURT OF THE UNITED STATES

October Term 1941.
No. 1174

WARDNER G. SCOTT, STATE ENGINEER, AND HEAD OF THE DEPARTMENT OF ROADS AND IRRIGATION OF THE STATE OF NEBRASKA;

ROBERT H. WILLIS, CHIEF OF THE BUREAU OF IRRIGATION, WATER POWER AND DRAINAGE, DEPARTMENT OF ROADS AND IRRIGATION OF THE STATE OF NEBRASKA, PETITIONERS,

V.

UNITED STATES OF AMERICA;
FARMERS IRRIGATION DISTRICT, A PUBLIC CORPORATION OF NEBRASKA;

LEO DANIELS, OTTO JUERGENS AND JAMES PICKERING, DIRECTORS OF THE FARMERS IRRIGATION DISTRICT AND E. O. DAGGETT, MANAGER OF THE FARMERS IFRIGATION DISTRICT;

RECONSTRUCTION FINANCE CORPORATION, A CORPORATION, RESPONDENTS.

## PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

WALTER R. JOHNSON, Attorney General of Nebraska,
JOHN L. RIDDELL, Assistant Attorney General of Nebraska,
PAUL F. GOOD, Special Counsel,
*Attorneys for Petitioners.*

WEIDNER-HEIDEMAN CO., Law Briefs, Lincoln, Neb.

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RECONSTRUCTION FINANCE CORPORATION, A CORPORATION, RESPONDENTS.

## PETITION FOR WRIT OF CERTIOARARI.

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Your petitioners, the State Irrigation Authorities of the State of Nebraska, respectfully present this their petition for review on writ of certiorari of a decision

of the United States Circuit Court of Appeals for the Eighth Circuit rendered December 23, 1941 (Record, p. 729, 124 Fed. [2d] 850), rehearing denied January 28, 1942 (Record, p. 769, 124 Fed. [2d] 863), in the case entitled *United States* v. *Tilley*. The petitioner, Wardner G. Scott, being successor in office to A. C. Tilley, appellee in the United States Circuit Court of Appeals, has been substituted as a party in this cause for the said A. C. Tilley.

## SUMMARY STATEMENT OF THE MATTER INVOLVED.

1. The matter involved is a controversy between the United States of America on the one hand and the State Irrigation Authorities of the State of Nebraska on the other, relating to the control and distribution of the waters flowing in certain drainage ditches in the State of Nebraska. Such waters are for the most part seepage, return flow, or drainage coming from irrigation practiced by citizens of the State of Nebraska upon Nebraska lands in the Pathfinder Irrigation District with waters diverted in the State of Wyoming and conducted to said lands by a canal originally constructed by the United States under the authority of the United States Reclamation Act (Act of June 17, 1902), 32 Statutes at Large, 388 ff. The suit was commenced by the United States in the District Court of the United States, District of Nebraska, North Platte Division, on November 20, 1937, as an injunction action. In so far as pertinent to the matters raised in this petition for certiorari, the petition of the United States was for an injunction to compel the State Irrigation Authorities of the State of Nebraska to make the drainage waters available for the lands under the Northport Irrigation District, an

irrigation project watered through another canal constructed by the United States under the same Act of Congress. The contention of the United States was that these waters were under United States control. The contention of the irrigation officers of the State of Nebraska, petitioners herein, was that the said waters were public waters of the State of Nebraska, which should be supplied to Nebraska water users who had priorities senior to the priority of the Northport and who then required the water, since there was not enough water available at the time complained of for an adequate supply to those canals which were senior to the Northport. In addition, the petitioners raised as defenses certain equitable grounds hereinafter discussed.

2. In the State of Nebraska waters are distributed and administered on the basis of priority of appropriation, the waters of the state being dedicated to the people of the state for beneficial purposes (Constitution, Art. 15, Secs. 5, 6 and 7; C. S. Neb. 1929, Chapter 46, Art. 5, especially Sections 46-501 to 46-506).

3. The Tri-State Canal is operated by the Farmers Irrigation District, and carries water for lands under two appropriations both duly adjudicated by the proper authorities of the State of Nebraska, one having priority date of September 16, 1887, for 905 cubic feet per second and the other having priority date of April 14, 1902 for 52 cubic feet per second (Record, p. 237). These appropriations have been the subject of some controversy, but in three Nebraska cases have been established as to priority date and amount, namely: *Farmers Irrigation District* v. *Frank*, 72 Neb. 136, 100 N. W. 286; *Enterprise Irrigation District* v. *Tri-State Land Company*, 92 Neb. 121, 138 N. W. 171 (error proceedings in this

court dismissed, 243 U. S. 157, 61 Law Ed. 644, 37 S. C. 318); *State ex rel Sorensen* v. *Mitchell Irrigation District*, 121 Neb. 586, 262 N. W. 543 (Certiorari denied, 297 U. S. 723, 80 Law Ed. 1007, 56 S. C. 667). In addition the Farmers Irrigation District carries through the Tri-State Canal waters for the Northport Irrigation District under a contract dated August 10, 1915, to which contract the parties were the United States, the Tri-State Land Company and Farmers Irrigation District (Record, p. 238). The Northport Canal, being physically an extension of the Tri-State Canal, was constructed following the date of that contract, and in the year 1926 the operation of the Northport Canal was turned over to the Northport Irrigation District, a public corporation organized and existing under the laws of the State of Nebraska.

4. The drains and canals in question are shown on the maps, Exhibit 2 (Record, p. 779), and Exhibit 43 (Record, p. 781). Reference is made to these maps for a further clarification of the physical and geographical features of this case. These drains are named in the findings of fact of the District Court (Record, p. 236). They are all artificially constructed drains or are artificially improved natural water courses which, prior to irrigation of Pathfinder Irrigation District lands, were dry except for flood spurts during occasional rains or melting snows. The lands which they drain all lie within the Pathfinder Irrigation District, a public corporation organized and existing under the laws of the State of Nebraska, and the waters supplying these lands are conducted to them through the Interstate Canal. These lands together with those under the Northport Canal have appropriation rights based upon the application made by the United States to the irrigation authorities of the

State of Nebraska under date of September 19, 1904. The application was made in accordance with the laws of the State of Nebraska and was authorized by Section 8 of the United States Reclamation Act (Act of June 17, 1902, 32 Statutes at Large, p. 390, Sec. 8, U. S. C. A. Title 43, Sec. 383).

5. Both the Interstate Canal with its laterals, structures, etc., and the Northport Canal with its laterals, structures, etc., were constructed upon a basis whereby the costs were ultimately to be repaid to the United States by the land owners and water users. Their water supply is in part such natural flow as is obtainable under the 1904 priority date, and in part storage water stored in the Pathfinder Reservoir and the Guernsey Reservoir in Wyoming. The Pathfinder Reservoir was constructed under a priority date in Nebraska of September 19, 1904, and in Wyoming of December 6, 1904, and the Guernsey Reservoir was constructed under a priority date granted in Wyoming as of April 20, 1923 (Record, p. 235).

6. While the Interstate Canal was constructed by the United States, and the irrigation project now known as the Pathfinder Irrigation District was initiated by the United States, it was turned over to the District in the year 1926 (Record, p. 235), and thereafter the United States retained control only of the reservoirs and of the diversion works in Wyoming (Record, pp. 235 and 236). At about the same time control of the Northport works was turned over to the Northport Irrigation District (Record, p. 236). Thus since 1926 the United States has exercised no control in Nebraska of any of the irrigation works or activities, even of the projects initiated by it.

7. In Nebraska there are appropriations from the North Platte and Platte Rivers (to which latter river the North Platte River is tributary) senior to the September 19, 1904, priority date of the Interstate Canal, Northport Canal and Pathfinder Reservoir totalling 5,453.10 second feet* which appropriations are in turn junior to the September 16, 1887, appropriation of the Tri-State or Farmers Irrigation District Canal (Record, p. 242). In the immediate vicinity of the three canals and lying between the Wyoming-Nebraska state line and Bridgeport, Nebraska, the appropriations so intervening amount to 2,100.56 second feet.

8. The Tri-State or Farmers Irrigation District Canal runs in general parallel to but nearer the river than the Interstate Canal. Its diversion point is a short distance east of the state line between Nebraska and Wyoming, and is physically situated upstream from practically all Nebraska canals diverting from the North Platte and Platte Rivers. The canal intersects all the drains in question, some of which physically spill their waters into the Tri-State or Farmers Irrigation District Canal and have no outlet to the river except as the Farmers Irrigation District may choose to spill the drainage waters, after they have mingled with the canal waters, into the river through artificially constructed spillways along the course of the canal. The drains were constructed in part through contributions made by the Farmers Irrigation District and others. On such of the

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* In this petition and brief the terms "second feet" and "acre feet" are used. The term "second feet" or "cubic feet per second" refers to rate of flow and means the number of cubic feet of water which pass a given point in one second of time. The term "acre feet" is a measure of volume, and one acre foot is the quantity of water required to cover an acre to a depth of one foot, 43,560 cubic feet. Water flowing for 24 hours at the rate of one cubic foot per second will develop 1.97 acre feet or approximately 2 acre feet.

drains as have a course past the Tri-State Canal and direct to the river, there are structures by which the drainage waters can either be diverted to the Tri-State Canal or allowed to pass down to the river. These structures are not in any respect under the control of the United States, but are solely controlled by the Farmers Irrigation District under the direction and supervision of these petitioners, the Nebraska State Irrigation Authorities (Record, pp. 236 to 237).

9. For many years the drains have been handled under the direction and authority of the Nebraska State Irrigation officers (petitioners herein) by a system of "optional diversions" or exchange of water. By this system, the drainage waters are permitted to be taken by the Farmers Irrigation District for use upon lands watered by its canal and an equivalent amount deducted from the headgate diversions of the said canal so that there is made available for appropriators down stream from the headgate of the Tri-State Canal the amount of water which is supplied to the Tri-State Canal from the drains. Thus, in effect, this amount of water is made available to the canals diverting from the river below the Tri-State headgate. These waters in turn are supplied to Nebraska appropriators in the order of their priority (Record, pp. 240 to 241).

10. The United States complains of this practice contending that since the drainage water in question comes from lands watered by the Interstate Canal it is entitled to have them carried down through the Tri-State Canal to be supplied to the Northport Irrigation District. The Nebraska State Irrigation Authorities, petitioners herein, contend that the drainage waters are public waters of the State of Nebraska under the Ne-

braska Constitution and statutes above cited, and that through the system of optional diversions above mentioned, these drainage waters are properly distributed to appropriators in the order of their priority.

11. A particular time is complained of, namely the month of May, 1936. During that time the water supply in the North Platte River was so deficient that the Northport Canal had been ordered closed to natural flow by the order of the Nebraska State Irrigation Authorities and so had a considerable number of other canals, which had priorities intervening between the Tri-State priority and the Northport priority. During that time the Nebraska State Irrigation Authorities permitted the Tri-State Canal to take such drainage waters under the optional diversion system above described. The United States complained in this suit that said waters should have been permitted to come down through the Tri-State Canal and into the Northport Canal in order to supply the lands under the Northport Canal (Record, p. 245).

12. The Nebraska system of supplying drainage water to appropriators in the order of priority as public waters of the State of Nebraska inures to the benefit of the United States in the operation of the reservoir system and to the land owners under the Interstate Canal by reason of the fact that the canals so supplied with the return flow or drainage water are all senior to the most senior priority date under which such reservoirs and Interstate Canal are supplied (September 19, 1904). The supply to those senior canals lying down stream relieves the demand of such senior canals upon the up stream water supply, and enables the United States to store and the Interstate Canal to divert waters which, under the principle of priority, would be required to be

passed down stream for the benefit of such senior canals (Record, pp. 242 to 243). In the course of the six-year period from 1931 to 1936, these benefits so taken by the United States have amounted to more than 1,300,000 acre feet (Record, p. 243). The petitioners contend that the United States by taking these benefits has recognized the right of the senior Nebraska appropriators to such drainage waters, and that the benefits so enjoyed by the United States constitute the complete right of the United States to such drainage waters.

13. In addition to the benefits so enjoyed by the United States in connection with such waters, the United States during the period complained of (May, 1936) and both before and after, has consistently and as a matter of policy diverted and used out of priority considerable quantities of water to the detriment and damage of senior Nebraska appropriators including the Farmers Irrigation District involved herein. By "out of priority" is meant the diversion or storage of water at a time when the same was needed for beneficial use by appropriators further down the river having senior priorities. The quantities so taken in the years 1931 and 1934 to 1937, inclusive, total approximately 170,000 acre feet (Record, p. 246). It is contended by petitioners that this inequitable conduct of the United States constitutes an estoppel against the United States and creates a situation wherein the United States comes into a court of equity with unclean hands and calls for the application of the principle that he who seeks equity must do equity. Upon this point, the petitioners were denied consideration by the Circuit Court of Appeals.

14. The District Court found against the United States and in favor of these petitioners (see Findings of Fact and Conclusions of Law, Record, pp. 231 to 264). An

order of dismissal was entered March 30, 1939 (Record, p. 275). On appeal to the Circuit Court of Appeals for the Eighth Circuit, the Court, upon the issues involved in this petition, reversed the District Court and remanded the cause on December 23, 1941 (Record, pp. 729 to 751, 124 Fed. [2d] 850). These petitioners filed motion for rehearing (Record, pp. 753 to 768) which was denied by the Circuit Court of Appeals on January 28, 1942 (Record, pp. 769 to 771, 124 Fed. [2d] 863).

## STATEMENT OF JURISDICTION.

This court has jurisdiction in this cause on the following basis:

1. The jurisdiction of the District Court of this cause in the first instance was based upon Subdivision 1, Section 24 of the Judicial Code, U. S. C. A. Title 28, Section 41, Subdivision 1. This court has jurisdiction of this application for a writ of certiorari under the provisions of 240 (a) of the Judicial Code (U. S. C. A. title 28, Section 347, Subdivision [a]).

## THE QUESTIONS PRESENTED.

The questions presented by this petition for certiorari are as follows:

1. The main question presented is whether the waters arising as seepage or return flow from lands watered from a canal originally constructed by the United States are public waters to be distributed in accordance with the laws of the state where they are located, to appropriators in order of priority, or whether they are waters privately owned by the United States in a proprietary capacity to be allotted or distributed by the United States in accordance with the orders of the Secretary of the Interior.

2. Subordinate to and a part of this question is the question of whether or not the benefits taken by the United States from the return flow or seepage waters flowing through the drains by taking waters which would be required to go down stream to supply lower senior appropriators but for the return flow supply furnished to them, exhausts the right of the United States to benefits out of the return flow, or whether in addition, the United States can take these return flow waters away from the senior appropriators.

3. In this case there is also involved the question of whether the United States, in the operation of its reclamation projects in the State of Nebraska, is subject to Nebraska laws and subject to the control of the Nebraska State Irrigation Authorities in the same manner as private irrigation projects, in view of the provisions of Section 8 of the Reclamation Act (U. S. C. A. Title 43, Section 372).

4. Another question raised is as to whether, in view of the inequitable conduct of the United States in taking water away from Nebraska appropriators out of priority, the United States equitably may assert rights in respect thereto in a court of equity in view of the equitable principles that he who seeks equity must do equity and that one who comes into a court of equity must come with clean hands.

## REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. It is respectfully submitted that the decision of the United States Circuit Court of Appeals for the Eighth Circuit, above referred to, is contrary to the applicable laws of the State of Nebraska. The decision of ques-

tions such as those involved herein turns largely upon the state laws of the state wherein the use of the water is involved (*Snake Creek Mining and Tunnel Company* v. *Midway Irrigation Company*, 260 U. S. 596, 67 Law Ed. 423). The Nebraska Constitution and statutes require that waters be distributed in order of priority (Constitution of Nebraska, Art. 15, Secs. 5, 6 and 7; C. S. of Neb. 1929, Chapter 46, Art. 5, especially Sections 501 to 506). The decision in question permits the Northport Irrigation District, a district whose lands have appropriations junior to most of the appropriations in Nebraska, to use the waters in question in preference to Nebraska appropriators having priorities greatly senior to the priorities enjoyed by the Northport.

2. The Circuit Court of Appeals erred in following the case of *Ide* v. *The United States*, 263 U. S. 497, 68 Law Ed. 407, rather than the later case of *Ickes* v. *Fox*, supra, 300 U. S. 82, 81 Law Ed. 525. This court in the case of *Ickes* v. *Fox*, in holding that in its operations under the Reclamation Act the United States is merely a carrier of water having no right itself to make use of the same for beneficial purposes, destroyed any possible application which *Ide* v. *United States* might have to a factual situation such as exists in the instant case.

3. In Nebraska water rights, as usufructuary rights, are appurtenant to the land on which the waters are used (*Farmers Canal Company* v. *Frank*, 72 Neb. 136, 100 N. W. 286). The same rule applies with reference to water rights acquired in connection with the Reclamation Act (see Section 8, Reclamation Act, Act of June 17, 1902, Chapter 1093, 32 Stat. at Large 390, U. S. C. A. Title 43, Sec. 372; *Ickes* v. *Fox*, supra, and same case below, 85 Fed. [2nd] 294, 66 App. D. C. 128). Since

the right which was owned as an intangible usufructuary right to make use of the waters diverted through the Interstate Canal at Whalen, Wyoming, was appurtenant to the lands included in the Pathfinder Irrigation District, the exercise of that right could give no right to the United States or to the Northport Irrigation District to recapture the waters escaping from the land to which they were applied under appurtenant rights. Thus the Circuit Court of Appeals has decided this case probably in conflict with the applicable decisions of this court including *Ickes* v. *Fox*, supra.

4. This decision of the Circuit Court of Appeals for the Eighth Circuit is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Marks* v. *Hilger*, 262 Fed. 302. In the latter case it was held that the senior or prior appropriators were entitled to the seepage or return flow waters and that the junior appropriator further upstream, from whose lands the seepage came, had no right to the control of such waters after they had left his lands. The decision of the Circuit Court of Appeals in this cause is obviously in conflict with that decision since it gives the United States (assuming the United States to have the status of an appropriator) rights in such seepage waters superior to those of senior Nebraska appropriators, although the lands to which the United States proposes to furnish such waters are very substantially junior in right to the rights of such other Nebraska appropriators.

5. The questions involved in this cause include a question not heretofore decided by this court of the interpretation of the United States Reclamation Act (and, therefore, a federal question) as to the powers of the Secretary of the Interior in relation to the state

authorities of a state in which the United States Bureau of Reclamation is carrying on activities under the authority of the Secretary of the Interior. Section 8 of the Reclamation Act provides that in its operations thereunder, the Secretary of the Interior shall proceed in conformity with the laws of the state, and that no powers given shall interfere with the laws of any state or territory relating to the control, appropriation, use or distribution of water used in irrigation or any vested right acquired thereunder (United States Reclamation Act, Act of June 17, 1902, Chapter 1093, Sec. 8, 32 Stat. at Large 390). While there are some decisions relating to the rights of an individual in relation to the United States (*Ickes* v. *Fox*, supra; *Ide* v. *United States*, supra), it is submitted that there are no decisions of this court in causes wherein the state irirgation officers were parties, which determine the respective fields or powers of the United States in relation to such state officers. In view of the increasing importance of irrigation in western states, and in view of the possible conflicts which may exist, it is important that the meaning of Section 8 of the Reclamation Act should be decided; this can be decided best in a cause wherein both the United States and the State Irrigation Authorities are parties.

6. In refusing to consider the defense urged by these petitioners in relation to out of priority diversions, the Circuit Court of Appeals has decided a question of interstate rights in conflict with the applicable decisions of this court, particularly, the case of *Weiland* v. *Pioneer Irrigation Company*, 259 U. S. 498, 66 Law Ed. 1027. In that case this court held that as among the appropriators of water from an interstate stream where the diversion was in one state for use in another, the principles of priority of appropriation should be applied without re-

gard to state lines, and the prior appropriator was entitled to the use of the water in his order of priority even though the water was not to be used on land within the state wherein the diversion was made. In the instant case, the Circuit Court of Appeals held that the question of violation by the United States of the principle of priority of appropriation was a matter to be decided in an interstate suit now pending, and that it should take no cognizance of the issues raised by such defense. If the case of *Weiland* v. *Pioneer Irrigation Company* had been applied, the Circuit Court of Appeals would have necessarily considered the questions involved in the defense on behalf of these petitioners that the United States was estopped from obtaining relief in a court of equity by reason of its inequitable conduct in disregarding the principle of priority of appropriation.

7. The Circuit Court of Appeals erroneously assumed that the pendency of the original action in this court, *State of Nebraska* v. *State of Wyoming*, prevented the consideration by it of the matters of conflict between the United States and the State of Nebraska on division and control of water, and, thereby, said court did injustice to the State of Nebraska, its irrigators and its state water administration authorities. In the opinion in this court on Wyoming's motion to dismiss in that case (*Nebraska* v. *Wyoming*, 295 U. S. 40, decided April 1, 1935), this court held that in so far as the United States diverts water in Wyoming, its rights interstate can rise no higher than those of Wyoming, and an adjudication of Wyoming's rights will necessarily bind the Secretary of the Interior in his functions in operating United States Reclamation Projects. It is true that the United States was permitted to intervene in that cause subsequent to such decision (304 U. S. 545). However, the opinion

above referred to still stands as the opinion of this court, and thus the issues in said case are substantially different from the issues now being presented herein. The United States as plaintiff commenced this case in the District Court of the United States for the District of Nebraska in November of 1937 (Record, p. 31), and the intervention of the United States in the case of *Nebraska* v. *Wyoming* was on May 16, 1938 (304 U. S. p. 545). When the United States voluntarily undertook to submit this cause to the District Court of the United States, it is unfair and inequitable that it should be permitted to exclude from consideration issues germane and to the subject matter which might be considered as defenses merely because they are also involved in the case which was previously pending in the court, but in which the United States did not intervene until after it had commenced the case at bar.

WALTER R. JOHNSON,
Attorney General of Nebraska,

JOHN L. RIDDELL,
Assistant Attorney General of Nebraska,

PAUL F. GOOD,
Special Counsel,

*Solicitors for Wardner G. Scott, State Engineer, and Head of The Department of Roads and Irrigation of the State of Nebraska; and Robert H. Willis, Chief of the Bureau of Irrigation, Water Power and Drainage, Department of Roads and Irrigation of the State of Nebraska,*
*Petitioners.*